Filed 11/14/16 P. v. Rivas CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MIGUEL RIVAS, Defendant and Appellant.	G051672 (Super. Ct. No. 12NF1955) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Thomas A. Glazier, Judge. Affirmed in part, reversed in part, and remanded for resentencing.

Susan S. Bauguess, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr., and Marilyn L. George, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant Miguel Rivas appeals the trial court's disposition of his petition for resentencing pursuant to Penal Code section 1170.18.[1] He argues that while the trial court properly reduced his felony conviction for possession of a controlled substance to a misdemeanor, the court should also have dismissed a second count for street terrorism. We conclude that designation of an earlier felony conviction as a misdemeanor means there is no longer any legal basis to convict defendant of the street terrorism count. The trial court therefore should have granted defendant's request to dismiss the street terrorism count. We therefore affirm in part, reverse in part, and remand for resentencing.

I

FACTS

In June 2012, defendant was charged with felony possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)), and street terrorism (§ 186.22, subd. (a)). In September 2012, defendant pleaded guilty to both counts. He was sentenced to three years of formal probation on specified terms and conditions, and 90 days in jail. Counsel moved to reduce the street terrorism count to a misdemeanor, and the court granted the motion.

In November 2014, the voters approved Proposition 47, the "Safe Neighborhood and Schools Act." Proposition 47 reclassified certain offenses from felonies to misdemeanors and created a postconviction resentencing procedure for those convicted of felony offenses that have been reclassified. (§ 1170.18; *People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091-1093.) Among the crimes reclassified was the possession of a controlled substance. (§ 1170.18, subds. (a), (b).)

[1] Subsequent statutory references are to the Penal Code unless otherwise indicated.

An individual "currently serving a sentence" may petition for resentencing under section 1170.18, subdivision (a), of the statute. In contrast, section 1170.18, subdivision (f), states someone who has "completed his or her sentence" of a reclassified offense may apply to have the conviction reclassified as a misdemeanor. In December 2014, defendant petitioned under subdivision (f) to reduce count one to a misdemeanor.[2]

At the hearing on March 4, 2015, the court granted defendant's request as to the methamphetamine possession count. Shortly thereafter, counsel returned to court and asked the court to dismiss the street terrorism count because the predicate felony had been reduced to a misdemeanor, and because recent case law precluded a conviction for street terrorism by one person acting alone. The court stated that a Proposition 47 petition was not an appropriate avenue to dismiss the street terrorism count, although defendant may wish to pursue an alternate form of relief. Defendant now appeals.

II

DISCUSSION

Scope of Proposition 47 Relief

Section 186.22, subdivision (a), states: "Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years." The California Supreme Court has determined that misdemeanor conduct does not satisfy the "'felonious conduct'" element of the offense. (*People v. Infante* (2014) 58 Cal.4th 688, 694-695.)

Accordingly, defendant argues, when his petition under section 1170.18

[2] The petition states defendant had "completed his sentence" on both counts, but he was in custody at the time. We surmise this was on an unrelated matter.

was granted to reduce his methamphetamine possession offense to a misdemeanor, the court was required to dismiss the street terrorism charge. The pertinent question, then, is whether section 1170.18 permits dismissal of a collateral offense premised on felonious conduct when the underlying crime is no longer a felony.

Under section 1170.18, subdivision (f), "[a] person who has completed his or her sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under this act had this act been in effect at the time of the offense, may file an application before the trial court that entered the judgment of conviction in his or her case to have the felony conviction or convictions designated as misdemeanors."

Further, under section 1170.18, subdivision (k), which was also enacted as part of Proposition 47, states in relevant part: "Any felony conviction that is recalled and resentenced under subdivision (b) or designated as a misdemeanor under subdivision (g) [of section 1170.18] shall be considered a misdemeanor for all purposes . . . ."

Because this is a matter of statutory construction, our review of this issue on appeal is de novo. (*Smith v. Superior Court* (2006) 39 Cal.4th 77, 83.) Our role is to ascertain the intent of the Legislature (or, in the case of a voter-adopted initiative, the electorate) in order to effectuate the statute's purpose. We first consider the statute's language, and if that language is clear, the plain meaning controls, and we need not look to secondary sources to determine the statute's intent. (*Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 916.)

Section 1170.18, subdivision (k), states clearly that a felony redesignated as a misdemeanor under the statute shall, with exceptions not relevant here, be treated as a misdemeanor for all purposes. We interpret "all purposes" to mean that the now-redesignated misdemeanor cannot serve as the predicate crime for a charge of street terrorism, which requires underlying felonious conduct. Without a predicate felony, the

elements of a conviction for street terrorism are not met. (*People v. Infante, supra,* 58 Cal.4th at pp. 694-695.)

While we find this is an issue of first impression with respect to a separate but related count, various courts have considered the same issue with respect to enhancements in light of the enactment of Proposition 47. Some courts have found striking the enhancement where an underlying felony has been reduced to a misdemeanor is appropriate, while others have not.[3] (See, e.g., *People v. Abdallah* (2016) 246 Cal.App.4th 736; cf. *People v. Jones* (2016) 1 Cal.App.5th 221, review granted Sept. 14, 2016, S235901.)

An older case, however, sheds some light on the matter. In *People v. Flores* (1979) 92 Cal.App.3d 461 (*Flores*), new legislation reduced the defendant's prior felony to a misdemeanor. The court concluded the felony conviction could not be the basis for a felony enhancement, once the underlying crime was no longer a felony. (*Id.* at pp. 470-471.) The court in *Flores* relied on *In re Estrada* (1965) 63 Cal.2d 740, 745 (*Estrada*), which stated: "[w]hen the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply."

The same fundamental principle applies here, and we therefore agree with the cases that have interpreted Proposition 47 as permitting the striking of enhancements once the predicate offense is reduced to a misdemeanor. For the same reasons, once the

[3] This issue, and a similar issue regarding convictions for failure to appear, are under review by the California Supreme Court. (See *People v. Valenzuela* (2016) 244 Cal.App.4th 692, review granted March 30, 2016, S232900; *People v. Eandi* (2015) 239 Cal.App.4th 801, review granted Nov. 18, 2015, S229305.)

felony on which the street terrorism conviction was based was reduced to a misdemeanor, the street terrorism conviction, too, must fall.

As for the trial court's reasoning that an alternate avenue of relief must be sought, we disagree. Forcing defendants in this position to file a habeas petition or some other form of collateral relief is an unnecessary burden on both them and on the courts. Despite the Attorney General's arguments to the contrary, we find the language of section 1170.18 is broad enough to encompass "resentencing" (see, e.g., § 1170.18, subds. (a), (k)) as a whole where it is appropriate, and not just on the count subject to reduction or redesignation. Resentencing can include dismissing a count that is no longer legally supportable, which was the case here. We therefore conclude the trial court should have dismissed the street terrorism count.

III

DISPOSITION

The matter is reversed in part, and remanded with directions to dismiss the street terrorism count. In all other respects, the court's order is affirmed.

MOORE, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

ARONSON, J.